

LYNCH ICHIDA THOMPSON KIM & HIROTA

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Attorney for Plaintiff
WAYNE BERRY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WAYNE BERRY, a Hawaii citizen;	)	Civ. No. CV03 00385 SOM-LEK
	)	(Copyright)
Plaintiff,)	
	)	DECLARATION OF TIMOTHY J.
vs.	)	HOGAN FILED IN SUPPORT OF
	)	PLAINTIFF WAYNE BERRY'S
HAWAIIAN EXPRESS SERVICE,	)	OPPOSITIONS TO THE
INC., a California corporation; et al.	)	FLEMING-PCT'S MOTIONS IN
	)	LIMINE NOS. 1 THROUGH 9;
	)	EXHIBITS "A" THROUGH "N";
Defendants.	)	CERTIFICATE OF SERVICE
)	
_____)	

**DECLARATION OF TIMOTHY J. HOGAN FILED IN
SUPPORT OF PLAINTIFF WAYNE BERRY'S OPPOSITIONS
TO THE FLEMING-PCT'S MOTIONS IN LIMINE NOS. 1 THROUGH 9**

I, TIMOTHY J. HOGAN, am an attorney licensed to practice before all the courts of Hawaii and I make this declaration under penalty of perjury. All the

statements herein are true and correct to the best of my knowledge, information and belief. If called upon to testify regarding the matters contained herein, I am competent and willing to do so. This declaration is filed in support of Mr. Berry's oppositions to the Motions in Limine filed by the PCT.

1. Attached hereto as Exhibit "A" is a true and correct copy of the expert report of Thomas T. Ueno, CPA submitted on March 21, 2005 that has been earlier authenticated in Mr. Ueno's declaration filed in support of Plaintiff's Opposition to the PCT's Motion for Partial Summary Judgment as to Damages.

2. Attached hereto as Exhibit "B" is a true and correct copy of a letter from Fleming to Wayne Berry dated October 28, 1999, that was formerly an exhibit in the first infringement case and is submitted here as Plaintiff's Exhibit "21." The exhibit was maintained by me in the regular course and will be further authenticated at trial. This along with all the documents from the original infringement trial were disclosed in Mr. Berry's initial disclosures. The best of my recollection, Fleming never asked to review and/or copy any of the disclosed documents.

3. Attached hereto as Exhibit "C" is a true and correct copy of Plaintiff Wayne Berry's Initial Disclosures in the instant case.

4. Attached hereto as Exhibit "D" is a true and correct copy of Plaintiff's

Exhibit "2" which is a true and correct invoice from Wayne Berry for \$2.0 million backdated to January 14, 1996 that was referred to in the expert reports of both Mr. Ueno and Mr. Kinrich and that was an exhibit in the earlier Berry infringement case. The exhibit was maintained by me in the regular course and will be further authenticated at trial.

5. Attached hereto as Exhibit "E" is a true and correct Supplemental Declaration of Mark Dillon filed in Delaware by Fleming Companies, Inc. and their counsel Kirkland & Ellis in regard to Mr. Berry. This document I obtained through service by what is now the PCT's counsel in regard to an adversary proceeding that it filed against Mr. Berry that has subsequently been dismissed in Delaware.

6. Attached hereto as Exhibit "F" is a true and correct excerpt of the transcript of an omnibus hearing before the Honorable Marian F. Walrath, United States Bankruptcy Judge, taken on July 26, 2004 in *In re Fleming Companies, Inc.*, Bk. No. 03-10945 MFW (Bankr. Del.).

7. Attached hereto as Exhibit "G" is a true and correct Affidavit of Damian Capozzola in Support of Fleming's Motion for Order Estimating Administrative Claim filed by Wayne Berry and Fleming's Objection to Claim Filed By Wayne Berry, Claim No. 18428. This document was served upon me by the Fleming, now

PCT counsel and is a true and correct copy of that document.

8. Attached hereto as Exhibit “H” is a true and correct excerpt of the Notice of Hearing of Defendant Fleming Companies, Inc.’s, etc. Motion to Set Aside Entry of Default and its Exhibit “A” which is a true and correct excerpt of the proposed answer that was used to obtain the setting aside of the default based on meritorious defense and among the third defense set forth on page 6 is the defense of license signed by the Plaintiff.

9. Attached hereto as Exhibit “I” is a true and correct copy of the excerpt of the Initial Disclosures of Defendant Fleming Companies, Inc., filed on October 29, 2003 wherein the Fleming attorneys disclosed all exhibits from *Berry v. Fleming* trial on page 3 at paragraph 3. Among those exhibits was the very document that Fleming claims was not properly disclosed in this case.

10. Attached hereto as Exhibit “J” is a true and correct copy of Fleming’s document HF00252 that is referred to in the Kinrich report and that was Plaintiff’s Exhibit that was therefore contained within the materials that Fleming refers to as disclosures and that was disclosed by Plaintiff in his disclosures in this case.

11. Attached hereto as Exhibit “K” is another copy of the Berry EULA that was Exhibit 208 in the first trial which was a defense exhibit that was disclosed in

the current defenses disclosures.

12. Attached hereto as Exhibit “L” is a true and correct excerpt of the expert report of Jeffrey Kinrich where at footnote 2 on page 2 discloses the document FH00252 to FH00254 that was the end user freight control document that the Fleming-PCT claims was not disclosed in this proceeding.

13. Attached hereto as Exhibit “M” are the Exhibits 10, 13, 14, 17, 26, 27, 29, 40, 45 and 46 that are referred to in the Fleming Motion in Limine No. 9.

14. Attached hereto as Exhibit “N” is a true and correct excerpt from the Deposition of Thomas Ueno taken in this proceeding on July 22, 2005.

15. The reason I informed the PCT counsel regarding issues related to the Guidance materials is that these materials contain Trojan Horse viruses and virus blocking software can cause the pop up of materials that are not intended. As no time did any of the attorneys who met with me ever deny the existence of the materials referred to in the Supplemental Declaration of Lex Smith.

I hereby declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

DATED: Honolulu, Hawai’i, January 10, 2006.

/s/ Timothy J. Hogan

TIMOTHY J. HOGAN

LYNCH ICHIDA THOMPSON KIM & HIROTA

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CERTIFICATE OF SERVICE RE:
DECLARATION OF TIMOTHY J. HOGAN FILED IN
SUPPORT OF PLAINTIFF WAYNE BERRY'S OPPOSITIONS
TO THE FLEMING-PCT'S MOTIONS IN LIMINE NOS. 1 THROUGH 9

I hereby certify that on the dates and by the methods of service noted below,
a true and correct copy of the Declaration of Timothy J. Hogan Filed in Support of

Plaintiff Wayne Berry's Oppositions to the Fleming -PCT's Motions in Limine
Nos. 1 Through 9 was served on the following at their last known addresses:

Served Electronically through CM/ECF on January 10, 2006:

Rex Y. Fujichaku rfujichaku@bchlawnet, jennifer@bchlawnet

Lyle S. Hosoda lsh@hosodalawnet

Raina P. Mead rpbm@hosodalawnet

Ann C. Teranishi act@ksglawnet

Thomas H.Y.P. Yee thy@ksglawnet

DATED: Honolulu, Hawai'i, January 10, 2006.

/s/ Timothy J. Hogan
TIMOTHY J. HOGAN
Attorney for Plaintiff WAYNE BERRY